

# THE STATE OF NEW HAMPSHIRE

## SUPREME COURT

**In Case No. 2003-0548, State of New Hampshire v. Carl A. Merk, the court on January 13, 2005, issued the following order:**

Following a jury trial, the defendant, Carl A. Merk, was convicted of felony reckless conduct by use of a deadly weapon. On appeal, he contends that the trial court erred in denying his requests to present a competing harms defense and the alleged statement of the victim. He also contests the sufficiency of the evidence. We reverse and remand.

RSA 627:3, I (1996) codifies the defense of competing harms. We have summarized the requirements for its availability as follows: “First, the otherwise illegal conduct must be urgently necessary, second there must be no lawful alternative, and third the harm sought to be avoided must outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the violated statute.” State v. L’Heureux, 150 N.H. 822, 825 (2004) (brackets omitted). “As a defense, once the trial judge has determined that competing harms is not precluded as a matter of law, it must be submitted to the trier of fact for determination.” *Id.* at 826. The applicable test is whether the evidence, viewed in the light most favorable to the defendant, would support a finding that there were no reasonable, lawful alternatives that would cause less, if any, harm. *Id.* at 827-28.

In this case, the defendant testified that the victim was hitting him as she drove and that “she wasn’t really paying attention to what she was doing while she was hitting me and . . . she wasn’t in control of the car.” After asking her to let him out three times, he briefly pulled on the emergency brake. That the State presented evidence to dispute the defendant’s account is not relevant to whether he should have been permitted to present his defense to the jury. Considering the evidence in the light most favorable to the defendant, we cannot conclude as a matter of law that the action he took was not urgently necessary, that there were other lawful alternatives, and that the harm sought to be avoided was not outweighed by the harm sought to be prevented by the reckless conduct statute. Accordingly, we reverse and remand for a new trial.

The defendant also argues that the trial court erred in excluding his testimony about a statement allegedly made by the victim approximately one month after the charged conduct. The trial court based its ruling on the defendant’s failure to disclose the substance of the statement pursuant to Superior Court Rule 98. The defendant argues that because it was neither a

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written nor recorded statement, it did not fall within the disclosure requirements of Rule 98. Although we agree with the trial court's statement of our general rules concerning full pretrial disclosure of the evidence, we conclude that Rule 98 did not bar admission of this testimony. Because the trial court did not consider whether the statement should have been barred on other grounds, we vacate its ruling and remand for its further consideration in the event of a retrial.

Finally, the defendant argues that the evidence was insufficient to establish that the emergency brake constituted a deadly weapon within the meaning of RSA 625:11, V (1996) and that the State failed to prove a nexus between the defendant's act and the resulting accident. RSA 625:11, V defines a deadly weapon as any "thing which, in the manner it is used, intended to be used, or threatened to be used, is known to be capable of producing death or serious bodily injury." We have never required that an object be intrinsically capable of causing death or injury, nor that it actually cause injury. State v. Hull, 149 N.H. 706, 715 (2003).

In this case, the evidence included that the victim was driving her vehicle on a major highway on Saturday night at a speed approximating 60 miles an hour, that the defendant told the victim, "I'll show you damage," just before engaging her emergency brake and that he was so intoxicated after the accident that he had to be taken into protective custody. Based on the record before us, we conclude that the evidence was sufficient to allow a reasonable jury to find that the defendant used the victim's car in a manner that was known to be capable of causing death or serious bodily injury. See State v. Parmenter, 149 N.H. 40, 43 (2002) (to prevail on challenge to sufficiency of evidence defendant must demonstrate that no rational trier of fact evaluating all evidence and its inferences in light most favorable to State could find guilt beyond reasonable doubt).

Reversed and remanded.

BRODERICK, C.J., and NADEAU and DALIANIS, JJ., concurred.

**Eileen Fox,  
Clerk**

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